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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SUMITOMO SHOJI AMERICA, INC.,
Petitioner and Cross-Respondent,
-v.-
LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,
Respondents and Cross-Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS AND CROSS-PETITIONERS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS AND CROSS-PETITIONERS

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon issuance of a writ of *certiorari* to the United States Court of Appeals for the Second Circuit. The Second Circuit heard this case on interlocutory appeal, and affirmed the order of the District Court of the Southern District of New York denying Sumitomo Shoji Amer-

ica, Inc.'s motion to dismiss the complaint.[1] *Avigliano v. Sumitomo Shoji America, Inc.*, 638 F.2d 552 (2d Cir. 1981)

The complaint states that the case "involves sex and national origin discrimination in employment" (App. 6a). The first cause of action alleges discrimination against women by restricting them to clerical jobs and failing to train and promote them to higher positions. The second cause of action alleges discrimination on the basis of nationality,[2] again alleging the same job restrictions and failure to train or promote (App. 9a).

The case is brought as a class action on behalf of all female Sumitomo employees and all women who have left Sumitomo because of its discriminatory policies and practices (App. 7a).[3]

Prior to filing its motion to dismiss, Sumitomo provided partial answers to interrogatories (App. 34a-69a). These answers disclose that Sumitomo is incorporated in the State of New York. It maintains its principal place of business in New York City and has branch offices in nine other American cities (App. 34a-36a). Sumitomo also has five wholly-owned American subsidiaries or affiliates.[4] As of December 1, 1977, Sumitomo employed approximately 464 persons, 230 of whom worked in New York City. Nationwide the company employed 199 women, 96 of whom worked in New York City (App. 37a-41a). Sumitomo broadly

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[1] Citations to the Appendices to the Petition For A Writ of *Certiorari* are indicated as Pet. App. ___a. Citations to the Joint Appendix are indicated as App. ___a.

[2] Petitioner and cross-respondent ("petitioner" or "Sumitomo") emphasizes in its brief that respondents' and cross-petitioners' ("respondents") complaint uses the word "nationality" rather than "national origin" in the second cause of action. See Pet. Br. 9, 17. This Court, however, has used the word "nationality" interchangeably with "national origin." See, *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971). Apparently, Sumitomo itself understands the interchangeability of nationality and national origin. *See*, Affidavit of J. Portis Hicks ¶ 3 (App. 73a), which refers to plaintiffs' claims as being based upon discrimination "by reason of their national origin."

[3] The parties have agreed to postpone filing and consideration of a motion for class certification pending resolution of the motion to dismiss.

[4] See, Petition For A Writ Of *Certiorari*, 4, n. 1. These corporations are Distributor Metals Corp., Emko Stainless Steel Inc., Fairway Village Inc., Industrial Metals, Inc., and Rising Sun Stainless Steel, Inc.

classifies employees as "executives," "managerial and supervisory" and "others" (App. 40a).

The record contains Sumitomo's Equal Employment Opportunity Employer Information ("EEO-1") reports for its New York City office which were filed with the Equal Employment Opportunity Commission ("EEOC") for 1975 and 1976 (App. 58a-69a). The 1976 EEO-1 reveals that Sumitomo listed 31 of 219 persons employed as "officials and managers." Twenty-eight of these 31 positions were filled by "Orientals."[5] All of these officials and managers were males. Presumably, therefore, Sumitomo employed three white male officials and/or managers.[6] Under the heading "professionals" Sumitomo states it employed 35 persons. Twenty-five of these were "Orientals." The other 10 were white males. No women were employed as professionals.

The 1976 EEO-1 states that 43 persons were employed as "sales workers," of whom 37 were Oriental males. Six, therefore, were white males. No women were employed as sales workers. Sumitomo employed women only in the "technician" and "office and clerical" categories (App. 67a).

Sumitomo has not yet answered interrogatories concerning its selection criteria for hiring and promotion (App. 42a). Therefore, there is no record with regard to Sumitomo's hiring and promotion practices and procedures. Sumitomo has stated in answer to an interrogatory that neither sex nor national origin is a bona fide occupational qualification ("bfoq") for any job within the company (App. 54a-55a). Nonetheless, Sumitomo does plead as an affirmative defense that its employment practices are justified by and exist pursuant to bona fide occupational qualifications and business necessity (App. 82a).

The district court denied Sumitomo's motion to dismiss the complaint on June 5, 1979 (Pet. App. 19a-37a). The district court noted that Sumitomo was relying on Article VIII(1) of the Treaty

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[5] "Orientals" is a minority group category used by EEOC for EEO-1 reporting (App. 61a, 67a).

[6] The EEO-1 indicates that Sumitomo employed no "Negroes," "American Indians," or "Spanish Surnamed Americans" in any of the job classifications discussed above.

of Friendship, Commerce and Navigation between the United States and Japan, 1953, 4 U.S.T. 2063, T.I.A.S. No. 2863 ("Treaty" or "FCN") which gives nationals and companies of either party the right to hire executive personnel, as well as certain other experts, professionals and specialists "of their choice." The court found, however, that Sumitomo was not a company of Japan, as defined by Article XXII(3). The court pointed out that this definitional article was consistent with "traditional rules of corporate law which . . . accord to the corporation the citizenship of its place of incorporation" (Pet. App. 23a).

Thereafter, Sumitomo moved for reargument, citing certain documents which the State Department had released to the parties after the court's initial decision. The district court, after considering these documents in detail, adhered to its initial decision (Pet. App. 45a-61a). The court determined that these additional documents merely established that, pursuant to Article VII(1) of the Treaty, Sumitomo was entitled to national treatment which would protect it against discrimination (Pet. App. 57a-60a). The court also noted that the drafters of the Treaty used language precisely, and knew how to give locally incorporated subsidiaries, as distinguished from their parent corporations, substantive rights (Pet. App. 59a). In reaching its decision, the district court noted that the State Department agreed that the negotiators did not intend to give Article VIII(1) rights to locally incorporated subsidiaries, but merely intended to protect such corporations by the more general provisions of Article VII (Pet. App. 56a).[7]

The court of appeals affirmed the district court's ruling. It held that Sumitomo could invoke Article VIII(1), but found that this provision did not excuse Sumitomo from complying with Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, *et seq.* The court held that the intent of the Treaty negotiators was to

[7] In reaching this conclusion, the State Department rejected an earlier opinion of its Deputy Legal Adviser Lee R. Marks (App. 94a-97a) which was rendered before the Department had fully analyzed the record of the Treaty negotiations. See, letter of Deputy Legal Adviser James R. Atwood, dated Sept. 11, 1979 (App. 307a-308a).

protect "companies operating abroad from local legislation restricting the employment of non-citizens" rather than to allow them to discriminate in the host countries (Pet. App. 13a-14a). The court stated:

> [N]o evidence supports Sumitomo's broad interpretation which, carried to its logical conclusion, would immunize a party not only from Title VII but also from laws prohibiting employment of children, . . . laws granting rights to unions and employees, . . . and the like (Pet. App. 14a).

The Second Circuit, however, structured a special bona fide occupational qualification exception under Title VII for use by a domestic subsidiary of a Japanese corporation. The court, after noting that normally the bfoq exception is to be narrowly construed, instructed that "due weight" should be given to "the Treaty rights and unique requirements of a Japanese company doing business in the United States, including such factors as a person's (1) Japanese linguistic and cultural skills, (2) knowledge of Japanese products, markets, customs, and business practices, (3) familiarity with the personnel and workings of the principal or parent enterprise in Japan, and (4) acceptability to those persons with whom the company or branch does business" (Pet. App. 14a-15a).

SUMMARY OF ARGUMENT

The plain language of the Treaty, an analysis of its negotiating history, and the opinions of both the State Department and the Ministry of Foreign Affairs of Japan, establish that Sumitomo, as a New York incorporated subsidiary of a Japanese company, obtains no rights under the "of their choice" provision of Article VIII(1). *Spiess v. C. Itoh & Co. (America), Inc.*, 643 F.2d 353 (5th Cir.) (Reavley, J., dissenting), *reh'g en banc granted*, 654 F.2d 302 (1981), *order granting reh'g en banc vacated*, 664 F.2d 480 (1981).

Sumitomo's practice of employing almost exclusively Japanese men as executive, managerial, supervisory and sales personnel is

inherently discriminatory on national origin, race and sex grounds. The ruling in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973), that an employer's United States citizenship requirement is not a *per se* violation of Title VII, does not immunize Sumitomo's practices from judicial scrutiny.

Article VIII(1) of the Treaty, even if applicable to Sumitomo, does not give the petitioner the right to engage in prohibited employment discrimination. Article VIII(1) was intended to eliminate employment bars based upon alienage. It was not intended to sanction employment discrimination or override state anti-discrimination laws in effect at the time the Senate ratified the Treaty. Moreover, the negotiators well understood the right, if not the obligation, of both nations to enact additional anti-discrimination employment laws after ratification of the Treaty.

Contrary to the contention of Sumitomo, the State Department's visa application review procedures do not insure that a domestic employer who employs treaty traders will do so in conformity with Title VII requirements. Moreover, the State Department visa application proceedings do not preclude Title VII review by the EEOC and the federal courts. *Alexander v. Gardner Denver Co.*, 415 U.S. 36 (1974).

The Second Circuit's attempt to broaden Title VII's bfoq exception conflicts with this Court's ruling in *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977), as well as with the applicable EEOC Guidelines, 29 C.F.R. §§ 1604.2 and 1606.4. The fact that Sumitomo conducts business in an international context does not justify a relaxed bfoq standard. *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981).

ARGUMENT

I.

A DOMESTIC SUBSIDIARY OF A JAPANESE CORPORATION MAY NOT INVOKE ARTICLE VIII(1) OF THE TREATY.

In accordance with the clearly defined grant of rights by the FCN, only nationals and companies of Japan may invoke the "of their choice" employment provisions of FCN Article VIII(1). This interpretation is derived from the plain language of the Treaty and is consistent with the position of the State Department, and the Japanese Ministry of Foreign Affairs, as well as with the Treaty negotiations documents.

Article VIII(1) covers two distinct rights. In the first sentence, it gives "nationals and companies of either party" the right to engage executive personnel, among others, "of their choice." In the second sentence, the Article permits "such nationals and companies" the right to engage certain professionals and experts, regardless of whether these persons are qualified to practice their professions in the territories of the other party, to perform limited internal functions for "such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest within such territories."

Thus, the drafters explicitly drew a distinction within Article VIII(1) itself between "nationals and companies of either party" and "enterprises in which they have a financial interest," e.g. a domestic subsidiary corporation. As Sumitomo is a company of the United States pursuant to Treaty definition (Article XXII(3)), under the plain language of the Treaty, Sumitomo may not invoke the "of their choice" provision. Although the plain language is not totally conclusive as to how a treaty provision should be interpreted, that language certainly is a starting point for analysis, and must be followed unless a clear intent of the parties to the contrary is positively established. See *Maximov v. United States*, 373 U.S. 49 (1963).

Sumitomo simply cannot meet its burden of establishing that the parties to the Treaty did not intend what the Treaty plainly

states. The most scholarly analysis of the record of the Treaty negotiations is found in the dissent by Judge Reavley in *Spiess v. C. Itoh & Co. America, Inc., supra*, 643 F.2d at 363-372 (Pet. App. 80a-97a). The *Spiess* court considered the same treaty issue now before this Court. Judge Reavley thoroughly analyzed the definitions, terms, structure, and secondary interpretive sources of the Treaty. Respondents submit that Judge Reavley's analysis is correct and respectfully urge the Court to adopt the conclusions of that opinion.[8]

Judge Reavley points out that Article XXII(3) of the Treaty states that a corporation has the citizenship of its place of incorporation. He also shows that the Treaty drafters used the terms "companies of either party" and "enterprises controlled by nationals and companies of [Japan]" with particularity and that these terms are not interchangeable. Rather, the terms were carefully chosen to give specific and distinct rights as between companies of each party and their subsidiaries operating in a host country. Under Judge Reavley's analysis, Article VII(1) grants companies of either party the right to control their subsidiaries in the territories of the other party, but does not grant subsidiaries the right to invoke the "of their choice" provision of Article VIII(1). As Judge Reavley points out, it is reasonable to believe that the Treaty negotiators would "reserve the most extraordinary degree of treaty protection only for business enterprises created under their own laws, and would allow enterprises created under the laws of the other party to be subject to those laws on a basis equal to all other companies of that party." 643 F.2d at 369 (Pet. App. 92a).

Judge Reavley also discusses and interprets two communications signed by former Secretaries of State Acheson and Kissinger. 643 F.2d at 369-371 (Pet. App. 93a-97a). The Acheson

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[8] Judge Reavley's dissent has been adopted by other courts as the definitive analysis on the issue of whether a domestic corporation may invoke the "of their choice" provision of the FCN. See *Porto v. Canon, U.S.A. Inc.*, No. 81 C 1305, N.D. Ill. (Sept. 9, 1981); *Mattison v. Canon, U.S.A., Inc.*, No. 81 C. 1304, N.D. Ill. (Oct. 1, 1981). These opinions appear as appendices to the Supplemental Brief in Support of the Petition for a Writ of *Certiorari*, at 1a-12a, 13a-16a.

communication (State Department Airgram A-49 to the American Embassy, Tokyo, dated July 23, 1952 [App. 145a-151a]) responded to an inquiry as to what would happen if citizens of a third country, which had not entered into an FCN with Japan, sought to gain treaty advantages by incorporating in the United States and then claiming privileges under the FCN. The airgram states at the outset:

> . . . Article XXII, paragraph 3 . . . establishes that whether or not a juridical entity is a "company" of either party, for treaty purposes, is determined solely by the place of incorporation. Such factors as the location of the principal place of business or the nationality of the major stockholders are disregarded (App. 145a-146a).

Secretary Acheson then points out that a specific Treaty section (Article XXI(1)(e)) was designed to allow each party "to protect itself against such an eventuality" by piercing "the corporate veil" if this situation were to arise. The Acheson airgram, therefore, establishes that the general rule as to corporate nationality can only be altered by specific language in a Treaty article.

The purpose of the Kissinger communication (State Department Airgram A-105 to the American Embassy, Tokyo, dated January 9, 1976 [App. 157a-159a]) was to give direction to Embassy officials seeking to convince Japanese officials that they should grant treaty trader status to two Americans seeking to work for a United States citizen owned business incorporated in Japan. As Judge Reavley stated:

> Secretary Kissinger was arguing against two extreme views, the Japanese government's view that the American-owned company incorporated in Japan had *no* rights under the Treaty, and the embassy view that an American-controlled Japanese company was still a company of the United States. Speaking to the Japanese government's view, Secretary Kissinger states that the definition of "company" in article XXII(3) does not deny rights under the Treaty. Of course it is

> quite accurate to say that a definition does not create or deny substantive rights, but it inherently limits the *scope* of rights conferred in other, substantive sections of the Treaty. Rejecting the extreme positions taken by the Government of Japan and the American embassy, Secretary Kissinger chose the middle view that conforms with the plain meaning of article XXII(3): an American- owned company incorporated in Japan is a "company of Japan" but still has the specific rights expressly granted to controlled enterprises by other sections of the Treaty, most notably the article VII(1) grant of national subsidiary treatment. 643 F.2d at 370-371 (Pet. App. 95a).

The logic of the *Spiess* dissent is now strengthened by the opinion of the State Department that Article VIII(1) of the Treaty was not intended to cover locally incorporated subsidiaries. This State Department opinion was promulgated eleven months after the Department had announced an earlier, ambivalent position in the Marks letter (App. 94a-97a),[9] a document heavily relied upon by Sumitomo. The Department justified its changed view by pointing out that subsequent to the Marks letter it had "conducted an extensive review of the negotiating files on our bilateral treaties of friendship, commerce and navigation (FCN), including the 1953 FCN with Japan, and has carefully weighed the question of coverage of subsidiaries by this treaty. . ." (App. 307a). The State Department concluded:

> On further reflection on the scope of the application of the first sentence of paragraph 1 of Article VIII of the U.S.-Japan FCN, we have established to our satisfaction that it was not the intent of the negotiators to cover locally incorporated subsidiaries and that there-

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[9] According to Mr. Marks, Sumitomo could invoke the "of their choice" provision, but nonetheless could not discriminate. He stated, "we do not believe that [the provision] confers any right to discriminate against a particular sex, religious or minority group." Marks referred to the "OECD Guidelines," discussed *infra*, as supportive of the State Department "view that Article VIII should not be read as conferring a license to discriminate" (App. 95a).

> fore U.S. subsidiaries of Japanese corporations cannot avail themselves of this provision of the treaty. In terms of selection of personnel, management or otherwise, the rights of such subsidiaries are determined by the general provisions of Article VII(1) and (4), which respectively provide for national and most favored nation treatment of such subsidiaries (App. 307a-308a).

The Department's interpretation of the Treaty is to be afforded great deference. *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961); *Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933). This position was in fact officially conveyed to the Government of Denmark, which was concerned about State Department interpretations of similar clauses in the friendship treaty between it and the United States (App. 322a-323a).

The State Department position is consistent with the Treaty negotiating documents which have been released to the parties in both this case and the *Spiess* matter.[10] Respondents again rely upon the excellent analysis of these documents by Judge Reavley (App. 93a-97a). However, respondents will comment on one of these documents which has been misinterpreted by the petitioner in its brief.

Petitioner erroneously relies on a letter from Herman Walker, Jr., of the State Department, dated October 28, 1955, to the counselor for Economic Affairs, American Embassy in The Netherlands (App. 287-291A) to support its position that a domestic subsidiary obtains all the substantive rights of its foreign parent under an FCN Treaty, regardless of whether such rights are afforded to a controlled enterprise or subsidiary under the specific provisions of the Treaty. See Pet. Br., 37-38.

The Walker letter dealt with proposed language to be added to the United States-Dutch FCN Treaty, 1956, 8 U.S.T. 2043,

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[10] The State Department's determinations are consistent with the conclusion reached by the National Labor Relations Board when the NLRB ruled that an American subsidiary of a foreign corporation should not be allowed to pierce its own corporate veil to exempt itself from American labor laws. *S.K. Products Corp.*, 230 N.L.R.B. 1211 (1977).

T.I.A.S. No. 3942 provision comparable to Article XXII(3) of the United States-Japanese Treaty. The Dutch had proposed a revision regarding a company's nationality which would have given a subsidiary all the rights of the foreign parent (App. 295a). They were concerned with the problem of local laws in the United States limiting the rights of aliens to acquire and own real property. See App. 278a-79a, 281a, 292a-94a. The United States refused to accept the across-the-board proviso sought by the Dutch and on September 16, 1955 Mr. Walker wrote the United States Embassy in The Netherlands:

> When this matter of providing that a controlled-company enjoys parent-company rights first arose in connection with real property, it could be confidently visualized that the principle was acceptable, because the mind could be focused on one mensurate problem. But, then, when last March it was proposed to extend this proposition to the whole Treaty, reservation became appropriate (App. 282a).

Mr. Walker also noted certain problems that might arise by an across-the-board proviso granting subsidiaries rights equal to those of foreign companies.

Following the September 16, 1955 Walker letter, the Dutch resubmitted their proposal in an altered form (App. 295a). The October 28, 1955 letter was a response to that proposal. The essence of the Walker letter is that the United States and the Dutch were in agreement that controlled companies or subsidiaries are "equated to domestic companies under the treaty or under legislation—a proposition which, as stated, does not run afoul of the Department's unwillingness to extend the limits" of the article dealing with real property (App. 287a). The "floor" which Mr. Walker writes about (Pet. Br. 37) guarantees domestic subsidiaries of foreign corporations national treatment, except where real property ownership may be involved. The "floor" does not relate to the treatment which may be accorded to the foreign parent under specific treaty sections. In fact, Walker's October 28, 1955 letter concludes that there "is no precedent whatsoever for the content and framing of a broad rule regarding the rights generally of 'controlled companies'..." (App. 291a).

The result of the Dutch-American negotiations was a rejection of the broad subsidiary rights principle. Instead, the parties added specific language to the real property Article, which is not in the United States-Japan Treaty, giving subsidiaries of Dutch companies additional rights only with regard to real property ownership. 8 U.S.T. at 2058-9. Petitioner has taken Mr. Walker's "floor and not a ceiling" statement out of context in an attempt to support its position before this Court.

Recently Released State Department Documents

On November 30, 1981, the State Department, with the approval of the Solicitor General, released certain additional documents dealing with the FCNs to counsel in this case.[11] Several of these documents shed additional light on whether the parties intended subsidiaries incorporated in the host country to be covered by Article VIII(1).

One of these documents is an airgram from the State Department to the United States Embassy in Japan concerning possible expropriations of properties of the other party—an issue covered by Article VI (State Department Airgram A-22, May 7, 1952). The airgram was sent at the time of the negotiations and considered the scope of the term "nationals and companies" as used in Article VI. Article VI prevents either government from singling out property owned by entities of the other for expropriation.[12] The airgram indicates that the term "nationals and companies" was believed insufficient to protect the property of a subsidiary incorporated under the laws of the other party. Thus, special clarifying language was inserted to insure that a

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[11] Those documents which directly discuss the United States-Japan FCN have been lodged with this Court, with the approval of the Clerk.

[12] The discussion in Airgram A-22 refers to a paragraph 5 of Article VI. The original draft included a different paragraph 4 which was transposed to a different part of the Treaty. Paragraph 5 was renumbered as paragraph 4. See, Airgram A-22, p. 3.

subsidiary would be protected.[13] The airgram states why additional language was necessary:

> The object of the Department's proposed wording is to go beyond the *direct* protection of American nationals and companies, already afforded, by establishing a rule regarding the enterprises in which they have an important interest, such enterprises being considered juridically distinct from such nationals and companies. It will be noted that these enterprises as such are not put under the rule of paragraph 3, which paragraphs (sic) would be applicable only as to the property interests which American (or, mutatis mutandis, Japanese) nationals and companies held therein. Airgram A-22, 3-4 (emphasis in original).

It is highly unlikely that in a treaty so carefully drafted the parent and subsidiary would be "juridically distinct" under Article VI(4), yet juridically identical under Article VIII(1). The State Department clearly recognized that "nationals and companies" did not include subsidiaries, and that specific language was needed to grant coverage to subsidiaries in those situations where coverage was desired, such as under Article VI.[14]

Three of the recently released documents reveal that the Ministry of Foreign Affairs of Japan ("MOFA") agrees with the State Department that American subsidiaries of Japanese corpo-

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[13] Article VI(4) reads as follows:

> Nationals and companies of either Party shall in no case be accorded, within the territories of the other Party, less than national treatment and most-favored-nation treatment with respect to the matters set forth in paragraphs 2 and 3 of the present Article. Moreover, *enterprises in which nationals and companies of either Party have a substantial interest* shall be accorded, within the territories of the other Party, not less than national treatment and most-favored-nation treatment in all matters relating to the taking of privately owned enterprises into public ownership and to the placing of such enterprises under public control (emphasis added).

[14] Even without the benefit of airgram A-22, Judge Reavley recognized the significance of the inclusion of specific and additional language in certain articles, such as VI(4), granting explicit rights to controlled enterprises or subsidiaries. 643 F.2d at 366-67 (Pet. App. 86a-87a).

rations may not invoke Article VIII(1). The first of these documents is a Foreign Service Inspector's Memorandum, dated November 1975, which was prepared during an evaluation of the consular offices in Japan.[15] The document discusses the issuance of treaty trader visas, points out that the Japanese were more restrictive in their interpretation of the FCN for purposes of issuing visas, and states:

> MOFA [the Ministry of Foreign Affairs] also indicates that a company incorporated in Japan or an individual doing business as a sole proprietor is a Japanese company and therefore excluded from treaty benefits, even though wholly-American-owned (p. 3).

Two additional telegrams from the American Embassy in Tokyo to the Secretary of State confirm that the Foreign Ministry of Japan still maintains the position that domestic subsidiaries cannot invoke Article VIII(1). The first telegram,[16] sent in August 1979, refers specifically to the instant case and to the 1978 letter of Deputy Legal Adviser Marks. After pointing out that the district court had denied a motion to dismiss respondents' complaint, the telegram states:

> Sumitomo Japan is seeking support from the Foreign Ministry which has denied it so far because the Ministry considers companies, like Sumitomo Shoji America, Inc., incorporated under U.S. law to be U.S. companies not entitled to the protection of the Japanese government.

The Embassy sought guidance from the State Department.

The second telegram, sent in September 1979,[17] indicates that the Embassy had attempted to convince the Foreign Ministry to modify its position. The Foreign Ministry, however, did not

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[15] The document is captioned, Department of State, The Conduct of Relations with Japan, Inspector's Memorandum No. 3.

[16] This telegram, which is two pages long, is numbered R030643Z Aug. 79. The subject is stated as "Foreign Ministry Interest in Discrimination Case, Lisa M. Avigliano, *et al* . . ."

[17] This telegram, which is two pages long, is numbered R100925Z Sep. 79.

change its position. MOFA pointed out that its immigration authorities in 1975 refused to issue a visa to an American citizen because the Japanese government "did not recognize the subsidiary as a U.S. company entitled to the rights and privileges defined in the FCN Treaty."[18]

Thus, the recently released documents show that the Japanese government adheres to the view that a domestic subsidiary cannot invoke the "of their choice" language of Article VIII(1).[19] This view is consistent with the position of the State Department, as well as the plain language of the Treaty and the intent of the Treaty negotiators.

II

SUMITOMO'S PRACTICE OF DISCRIMINATING IN FAVOR OF JAPANESE NATIONALS CONSTITUTES DISCRIMINATION IN VIOLATION OF TITLE VII.

Prior to the grant of *certiorari* in this case, Sumitomo argued that the Treaty "exempt[ed] Japanese trading companies and their wholly owned subsidiaries incorporated in the United States from the application of Title VII" (Pet. App. 3a). Sumi-

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[18] The telegram further indicates that the Japanese government did not concede this principle or grant a treaty trader visa to the individual, although it did permit this particular U.S. citizen to enter Japan on other grounds.

[19] Respondents note that the Ministry of International Trade & Industry of the Government of Japan has filed an *amicus curiae* brief in support of Sumitomo. This brief, however, makes no attempt to analyze the Treaty provisions or its negotiating history, nor does the Ministry comment upon the position which has been taken by the Ministry of Foreign Affairs of Japan, which is not only set forth in the recently released documents discussed above, but appears in a telegram released during the proceedings below. See Department of State telegram R130506Z of Aug. 1975 to American Embassy, Tokyo. The subject of this telegram is "GOJ interpretation of FCN Treaty," and the text concerns Japan's refusal to admit two Americans as treaty traders (App. 154a-155a).

tomo now admits that it is subject to Title VII and may not engage in prohibited discrimination.[20]

Sumitomo, nonetheless, advances arguments which would, if adopted, effectively immunize it from the reach of Title VII. Sumitomo maintains that Title VII allows it to discriminate on the basis of citizenship and impose a policy of hiring only Japanese "nationals" in executive, supervisory, specialist and sales positions. The petitioner asserts this as an absolute principle, making any factual determinations regarding the purpose or effect of that policy unnecessary.

Sumitomo relies on this Court's holding in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973) to claim that it may implement a Japanese nationals only policy. It argues that *Espinoza* upheld the right to discriminate on the basis of citizenship and therefore its exclusionary practice in favor of Japanese nationals is not in violation of Title VII. Sumitomo has, however, totally misread *Espinoza*.

Fundamental to the *Espinoza* holding was the fact that the challenged employment practice did not involve even the remote possibility of discrimination based on national origin. Mexican citizens challenged the employer's policy of hiring only United States citizens. The challenge was unsuccessful because the employer established that the bulk of its work force was comprised of persons of Mexican national origin. The challenged citizenship requirement, therefore, was not exclusionary and there was no showing of discrimination based on national origin.

The *Espinoza* case illustrates that a United States citizenship requirement is not inherently discriminatory. Americans are an

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[20] Petitioner states in its brief:

> Sumitomo makes no claim that it is "exempt" from Title VII or that is not an employer within the meaning of the Act. It concedes, for example, that it could not hire male U.S. citizens to the exclusion of female U.S. citizens. Similarly, it could not discriminate on the basis of national origin. . . . The issue therefore is not whether Title VII "applies" to Sumitomo, or to Japanese companies in general, but whether the employment practice under attack violates Title VII (p. 14).

extremely heterogenous, multinational people. Generally, therefore, an American citizenship requirement will not eliminate persons from different national origins or races from an employer's workplace. By contrast, when an American employer utilizes a foreign citizenship requirement, a strong possibility exists that the requirement will inherently restrict the ethnic and racial diversity of the work force. A Japanese citizenship requirement is bound to create an extraordinarily homogenous work force, in contrast to the heterogenous work force which would result from the non-discriminatory application of an American citizenship requirement.

Over 99% of the population of Japan is comprised of persons of Japanese ethnic origin.[21] Even though Sumitomo asserts that its policy has nothing to do with anyone's national origin, it is obvious that it has everything to do with national origin, as well as race. For Sumitomo to impose a Japanese citizenship requirement for its managerial staff is to insure that all the members of that staff will be of Japanese ethnic and racial origin. Sumitomo's asserted foreign citizenship requirement is synonymous with a national origin and/or racial exclusionary requirement.[22] Sumitomo's claim that it also excludes American citizens of Japanese

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[21] D. Whitaker, *Area Handbook for Japan* 70 (American Univ. Foreign Area Studies, 3d Ed. 1974). Of the non-Japanese residents (less than 1% of the population), 87% are ethnic Koreans. *Id.* Korean migration to Japan began in the 1920's. By World War II, approximately 2.5 million Koreans were residents of Japan, but they "were refused full citizenship." F. Chaffee, *Area Handbook for Japan* 72-73 (American Univ. Foreign Area Studies, 2d Ed. 1969). Following World War II, until the outbreak of the Korean War, almost 2 million Koreans were repatriated. The approximately 600,000 Koreans living in Japan, as of 1974, were still considered aliens, notwithstanding that they were either born in Japan or long term residents of Japan. *Id.* at 73; D. Whitaker, *supra*, at 70-71. Respondents do not know their present status.

[22] Respondents' complaint alleges jurisdiction under 42 U.S.C. § 1981, as well as Title VII. The § 1981 jurisdictional claim was stricken by the district court, despite respondents' contention that they could establish liability under this section if they could show that national origin discrimination was motivated by or indistinguishable from racial discrimination. The court rejected this contention (Pet. App. 32a). Thereafter, the court denied respondents' motion to certify this issue (Pet. App. 42a). Assuming this Court remands for trial, respondents could amend their Title VII claims to allege racial as well as national origin and sex discrimination.

origin from its managerial, supervisory and sales positions does not change the fact that the company's policy is inherently exclusionary. Sumitomo has structured a policy with the inevitable result that all of its employees, except those at the lowest levels, will be of one national origin and race.

Congress, in enacting Title VII, sought to bar employers from creating a work force comprised of people from one national origin, race or sex. To permit Sumitomo to maintain its exclusionary policy is to leave in place the very condition that Congress sought to dismantle.

Even if the national origin and racial implications of Sumitomo's stated policy were not so strikingly apparent, this Court in *Espinoza* held that a factual determination is always required to determine whether a citizenship test has the purpose or effect of discriminating in violation of Title VII.

> [A] citizenship requirement might be but one part of a wider scheme of unlawful national origin discrimination. In other cases, an employer might use a citizenship test as a pretext to disguise what is in fact national origin discrimination. *Certainly Tit. VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin.* 414 U.S. at 92 (emphasis added).

At this point in the proceedings it is impossible to determine whether Sumitomo's citizenship requirement has the purpose or effect of discriminating on the basis of national origin, race or sex. The record shows that most, but not all, of the company's officials and managers, professional and sales workers, are "Oriental" males. It is unknown if all of those listed on the EEO-1 reports as "Orientals" are in fact citizens of Japan. Some employees in each of these categories are white males. None, however, is female (App. 61a-67a). Thus, with regard to the sex discrimination claim, Sumitomo's EEO-1 reports show an exclusion of women in upper level positions, a pattern which must be analyzed at a trial. Moreover, given the negative attitudes in

Japanese society toward women in managerial positions,[23] the company's asserted citizenship requirement may well be a pretext for discrimination against women.

Nonetheless, Sumitomo structures an argument to foreclose a challenge based on sex discrimination. It asserts as fact that its only "criterion of preference . . . is Japanese nationality, not sex" (Pet. Br. 17-18), and argues that respondents have a "sex-plus" rather than a sex claim.[24] Citing *Spirides v. Reinhardt*, 22 Empl. Prac. Dec. (CCH) ¶ 30,740 (D.D.C. 1980), *aff'd without op.*, 656 F.2d 900 (D.C. Cir. 1981) and *Michalas v. Reinhardt*, No. 78-0920, *slip op.* at 4 (D.D.C. May 29, 1978), *aff'd without op.*, No. 79-2007 (D.C. Cir. June 21, 1980), Sumitomo posits as an absolute principle that there can be no sex discrimination when the employer's classification is based on citizenship as there is no correlation between nationality and gender.

Neither *Spirides* nor *Michalas* support this argument. In both cases, the courts determined that there was no correlation between citizenship and sex. For example, in *Spirides*, the court pointed out that the female plaintiff was replaced by a female with greater skills. Thus, neither the purpose nor effect of the citizenship requirement under consideration constituted sex discrimination. The court stated that there was no "factual reason to suspect that the citizenship factor operates to the greater disadvantage of women than of men." 22 Empl. Prac. Dec., *supra* at 14,826. The facts in this case, however, already point to employment practices which do limit women to low level positions regardless of their citizenship.

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[23] "Women workers [in Japan] are treated only as a temporary and complementary work force and have very limited opportunities for capacity development or for promotion and upgrading." U.S. Dept. of Labor, U.S. Employment Standards Administration, U.S. Women's Bureau, Japanese Ministry of Labor, Japanese Women's and Minors' Bureau, *The Role and Status of Women Workers in the United States and Japan* 41 (1976).

[24] Sumitomo misunderstands when a sex-plus claim arises. Such a claim arises when a discrete group of a protected class is burdened by a special limitation on its ability to work, as for example when employment is denied only to those women who are mothers. See e.g., *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

III.

THE TREATY NEITHER PROHIBITS THE UNITED STATES FROM PASSING ANTI-DISCRIMINATION LAWS APPLICABLE TO JAPANESE COMPANIES AND THEIR AMERICAN SUBSIDIARIES NOR LIMITS THE MANNER BY WHICH SUCH LAWS MAY BE ENFORCED.

Respondents maintain in Point I that Sumitomo, as a domestic subsidiary, may not invoke the "of their choice" provision of Article VIII(1). Assuming, however, that Sumitomo obtains Article VIII(1) rights, these rights do not in any manner undercut the applicability of Title VII.

A. The History Of The Treaty's Enactment Establishes That It Was Not Intended To Override Civil Rights Employment Laws.

1. State Department negotiations documents

Records released by the State Department reveal that the FCN negotiators sought to override local laws prohibiting the employment of foreign nationals by foreign companies doing business in a host country. Nothing in the negotiations record, however, supports a conclusion that the negotiators intended to limit the power of a host country to prohibit discrimination in employment.

With regard to the United States-Japan FCN, the Japanese negotiators were seeking assurances that state laws that discriminated against aliens would not apply to their nationals. For example, a December 17, 1951 United States dispatch from Tokyo to the State Department emphasized that the Japanese negotiators were interested in eliminating American employment bars "merely by reason of their alienage" (App. 123a). On January 7, 1952 the State Department responded that there were various state laws in effect at the time which would adversely affect aliens seeking work in the United States and that, "to the extent that the treaty contained a national treatment provision on the professions, any contrary provisions of state law would be

ipso facto overridden, insofar as Japanese nationals were concerned" (App. 135a).

State Department documents relating to other FCNs also confirm that the major concern with respect to employment rights was to override local laws which discriminated against nationals of foreign countries. Thus, a Foreign Service dispatch relating to the German FCN stated that "its major special purpose is to preclude the imposition of 'percentile legislation'" (App. 182a). These documents indicate that the employment provisions of the Treaty were intended to eliminate discrimination, not to allow the foreign enterprise the right to discriminate in the host country.

None of the documents relied upon by the Petitioner (Pet. Br. 25) stands for the proposition that Article VIII(1) was intended to allow foreign nationals or foreign companies, let alone their American incorporated subsidiaries, to hire exclusively foreign nationals for executive and specialist positions. For example, the focus of the Note from the United States High Commissioner for Germany (App. 254a-257a) concerned the need to establish that foreign professionals would be permitted, under certain circumstances, to practice in host countries. In the Note, the United States expressed its concern that licensing and citizenship requirements could interfere with the ability of American professionals to provide needed services to American owned businesses in Germany.

Respondents agree with Sumitomo's statement that "[l]aws limiting alien employment were a particular threat to the foreign investor's control" (Pet. Br. 26).[25] However, there is no basis for Sumitomo's contention that the resolution in the FCNs to this threat was to allow foreign corporations to discriminate at will against domestic workers. Indeed, a State Department official pointed out in a 1978 letter to the EEOC that the FCN merely gave the subsidiaries of Japanese companies doing business in

[25] Apparently, this is why the State Department objected (App. 93a) to a Uruguayan FCN draft which would give the parties the right to pass "laws designed to protect employment [for their own nationals]" (App. 91a), e.g. percentile legislation.

the United States "the right to employ Japanese persons on the same basis as American nationals. . . . The [Civil Rights] Act expresses the firm policy of the United States against all forms of discrimination and the FCN Treaty's language does not compel a finding of exemption for 'treaty traders' " (App. 100a).

2. The Senate FCN hearings

The legislative history of the Senate's ratification of this and other FCNs establishes that these treaties were not intended to limit the right of either the states or the federal government to pass anti-discrimination laws. With regard to the right of companies covered by the Treaty to employ personnel of their own choice, Assistant Secretary of State Samuel C. Waugh emphasized that this right was granted, "upon as favorable terms as the nationals of the country." *Commercial Treaties, Hearings before the Subcomm. on Commercial Treaties of the Senate Comm. on Foreign Relations*, 83d Cong., 1st Sess. 2 (1953) ("1953 Hearings").[26]

Assistant Secretary Waugh unequivocally stated that the FCNs were not intended to abrogate federal or state laws:

> In the current series of treaties of the type now before you it has not been the intent to introduce any new provisions that would be at variance with State or Federal laws . . . 1953 Hearings at 3.

Waugh had previously mentioned that the FCNs might affect state legislation restricting certain professions to citizens in "relatively minor respects." In response to this remark, Senator Hickenlooper sought and obtained assurances that the Treaty would not apply to professions involving public health and safety (1953 Hearings 3). Thus, the State Department was fully aware of the impact state laws could have upon both citizens and aliens. It is significant that at no time did the State

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[26] *Amicus curiae*, East Asiatic Co. Ltd. *et al.*, in its brief, has edited Assistant Secretary Waugh's testimony so as to totally distort the meaning and intent of his presentation. On p. 14 of its brief, the East Asiatic Co. quotes Mr. Waugh with regard to his comments that investors wanted assurances that they could employ personnel of their own choice, yet deletes the modifying clause that this right was sought "upon as favorable terms as the nationals of the country."

Department representative indicate that the FCNs would repeal or modify state anti-discrimination laws. At the time of the hearings, several states prohibited employment discrimination based upon race, creed, color or national origin. See e.g. Law Against Discrimination, N.J. Stat. Ann. Tit. 10, § 5-4 (West 1976), (law became effective 1945); New York Executive Law § 296 (a) (McKinney Supp. 1980) (first enacted in 1951).[27]

The intent of the American negotiators to leave state laws intact was given special emphasis at the hearings. At the conclusion of Mr. Waugh's testimony, Senator Hickenlooper asked Vernon G. Setser, the State Department's Chief of the Economic Treaties Branch Commercial Policy Staff:

> Is it the intent of the Department or the administration, in negotiating these treaties, either to enlarge the authority of the Federal Government for legislation within the States, or to curtail or restrict the authority of the States themselves in any matter where they have formerly had authority?

The State Department representative answered:

> No, sir. . . . 1953 Hearings at 4.

This answer was consistent with the State Department's position at the 1952 FCN hearings:

> In undertaking treaty commitments that would formally confirm to foreigners a substantial body of rights in the United States, the Department of State has exercised great care to frame provisions that would be in conformity with Federal law. . . . Furthermore, where the subject matter covers fields in which the States have a paramount interest, such as the formation and regulation of corporations and the ownership of property, the treaty provisions have been worked out with the same careful regard for the States' prerog-

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[27] Since 1938, the Constitution of New York, the state in which Sumitomo chose to incorporate, has prohibited discrimination by any employer. N.Y. Const. Art. I § XI (McKinney 1969).

atives and policies that has traditionally characterized agreements of this type.[28]

In this regard this Court has held that, wherever possible, a treaty should be construed to avoid conflicting with or overruling state laws. *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 143 (1938); *United States v. Pink*, 315 U.S. 203, 230 (1940).

In light of the legislative history, as well as this Court's rulings in *Guaranty Trust* and *Pink*, approval of the FCNs did not deprive the states of the right to enforce anti-discrimination laws asgainst employers asserting treaty rights. *A fortiori*, the federal government retained the right to pass its own anti-discrimination laws, and these laws cannot be deemed in conflict with the Treaty provisions.

3. The Treaty signatories anticipated enactment of civil rights legislation in the future

In addition to the fact that local anti-discrimination laws were in effect when the Treaty was negotiated and approved, both governments clearly understood that the other party might enact legislation barring employment discrimination. The Treaty itself makes clear in Article I that while treaty traders would be permitted to enter the territory of the other party, the host country preserved "the right . . . to apply measures that are necessary to maintain public order and protect the public health, morals and safety." The 1964 Civil Rights Act is a public health, safety and morals statute.

Moreover, at the time the Treaty was approved, the United States was a member of the United Nations, and Japan had officially declared its intention to apply for membership.[29] United Nations members pledge themselves to "take joint and separate

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[28] *Commercial Treaties, Hearings before the Subcomm. on Commercial Treaties of the Senate Comm. on Foreign Relations*, 82d Cong., 2d Sess. 6 (1952).

[29] Japan stated its intention to join the U.N. in the preamble to the Treaty of Peace between the United States and Japan, 1951, 3 U.S.T. 3169, T.I.A.S. 2490. Japan was admitted to the U.N. on December 12, 1956 by General Assembly Resolution 113 (XI).

action" for the achievement of "universal respect for and observance of human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion."[30]

Additionally, the Organization for Economic Cooperation and Development ("O.E.C.D."), the multi-lateral signatories of which include both the United States and Japan, issued Guidelines for Multinational Enterprises which provide that:

> Enterprises should, within the framework of law, regulations, and prevailing labor relations and employment practices, in each of the countries in which they operate . . . (7) implement their employment policies, including hiring, discharge, pay, promotions and training without discrimination unless selectivity in respect of employee characteristics is in furtherance of established governmental policies which specifically promote greater equality of employment opportunities. . .[31]

Clearly the Japanese and United States governments recognized their respective right and international obligation to pass civil rights laws which would be binding upon companies of the other.

4. Congress did not exempt FCN companies from Title VII coverage

It is significant that Title VII contains no exemption from coverage for employers covered by the FCN or other treaties even though Congress wrote numerous exemptions in the original statute and its amendments.[32] Title VII, in fact, contains two

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[30] U.N. Charter art. 55, 56.

[31] O.E.C.D. Guidelines for Multinational Enterprises, Chapter on Industrial Relations (June 21, 1976), *reprinted in* 1976 *Digest of United States Practice in International Law* 524.

[32] The law exempts employers with fewer than 15 employees, 42 U.S.C. § 2000e(b); labor organizations with fewer than 15 members, 42 U.S.C. § 2000e(e)(B); acts done to aliens outside the U.S., 42 U.S.C. § 2000e-1; religious schools, 42 U.S.C. § 2000e-2(e); Communists, 42 U.S.C. § 2000e-2(f); bona fide seniority or merit systems, 42 U.S.C. § 2000(e)-2(h); preferential treatment of Indians, 42 U.S.C. § 2000(e)-2(i); statutorily created veterans preferences, 42 U.S.C. § 2000e-11.

exemptions which specifically relate to employment situations with international implications—the exemptions for matters involving national security, 42 U.S.C. § 2000e-2(g), and for aliens outside any state, 42 U.S.C. § 2000e-1. Clearly, Congress has provided express exemptions when it believed they were necessary.

5. Commentators' views on FCNs

Herman Walker, who both parties agree played a leading role in formulating post World War II FCNs, stated that the purpose of these treaties was to place foreign corporations on an equal footing with domestic companies, and not in a preferred position, while recognizing that all companies would operate within the framework of local law. Mr. Walker stated:

> These considerations [of fitting the provisions of the Treaty into "the known fabric of United States law" and the known law of the other party to the Treaty] have led to the extensive use of so-called contingent standards as the cornerstone of rule-making. A contingent standard is, as its name implies, one that defines the treatment provided in relative terms. The specific content of the treatment, at any given point of time, and in connection with any given subject, is determinable not from a reading of the Treaty itself, but by reference to an exterior state of law and fact. The objective is to secure non-discrimination, or equality of treatment: a sort of "equal protection of the laws" objective. Walker, *Modern Treaties of Friendship, Commerce & Navigation*, 42 Minn. L. Rev. 805, 810-811 (1958).

Other American scholars have agreed with Walker. See Steiner & Vagts, *Transnational Legal Problems* 37-38 (Foundation Press 1968).

A leading Japanese commentator has taken a similar position, pointing out that Japan is fully entitled to enforce its laws against foreign enterprises functioning in Japan pursuant to an FCN as long as those laws are "applicable to the Japanese as

well." Fujita, *Does Japan's Restrictions on Foreign Capital Entries Violate her Treaties?*, 3 Law in Japan 162, 172, n.29 (1969).

6. C. Itoh & Co. (America), Inc.'s view of the Treaty

Contrary to the position taken by Sumitomo, *amicus curiae* C. Itoh & Co. (America), Inc. argues that United States employment laws of whatever nature have absolutely no application to wholly owned United States subsidiaries of Japanese corporations. Relying on the majority opinion in *Spiess v. C. Itoh & Co. (America) Inc., supra*, 643 F.2d at 359, Itoh claims that "[the Treaty] grants to U.S. companies in Japan and Japanese companies in the United States the vital right to select their own management and technical personnel without interference from the host country" (Itoh Br. 22-23). If this claim were upheld, a corporation such as Sumitomo or Itoh could decide to employ an all white, male American executive staff, and discriminate openly against blacks, women, religious denominations, or any other group the corporation disfavors. Obviously the negotiators of the Treaty did not intend this result.

B. The State Department's Processing Of Visa Applicants Seeking To Enter The United States As Treaty Traders Is Not A Substitute For Title VII Enforcement Procedures.

Sumitomo contends that the State Department has sole authority to enforce Title VII with regard to the employment of treaty traders. It claims that the State Department "operates an elaborate system for screening applicants for treaty trader visas . . . [and] has broad discretion to define the criteria for issuance of the visa and to insure that the number of treaty traders is appropriately limited" (Pet. Br. 32-33). It argues that Title VII principles will be respected because United States consular officers will not issue an E-1 visa to a "clearly ineligible person" (Pet. Br. 27).

The State Department, however, has never suggested that its visa evaluation process for treaty traders should preclude en-

forcement of Title VII by the EEOC or the federal courts. To the contrary, the State Department, in the October 17, 1978 Marks letter to the EEOC, unequivocally took the position that it reviews visa requests on an individual basis only and does not study the employment policies and practices of the prospective employer. Recognizing that the State Department could not make a determination or judgment as to whether a particular employer was in violation of Title VII, Mr. Marks concluded:

> In granting a non-immigrant treaty trader visa, the Department (or INS) thus makes an administrative determination that a visa applicant will fill an "executive personnel" position, but this determination is made for the limited purpose of administering the visa laws. We do not believe that the determination should preclude judicial review of the scope of the term "executive personnel" for other purposes, including the application of Title VII (App. 96a).

Treaty traders are evaluated for entry visas pursuant to 22 C.F.R. § 41.40(a). This regulation empowers the consular officer conducting the evaluation to determine only whether the applicant will be engaged in "duties of a supervisory or executive character" and whether "he has specific qualifications that will make his services essential to the efficient operation of the employer's enterprise. . ." A July 6, 1981 State Department telegram instructs consular officers making treaty trader evaluations that they should consider such details as the salary to be earned and the level of employees the applicant will supervise.[33] Thus, nothing in the regulation itself or the interpretive telegram empowers the consular officials to conduct an overview of an employer's equal opportunity performance, or to consider how an individual visa decision will affect that performance.

Additionally, it appears that the State Department has been extraordinarily liberal in determining what positions require executive personnel and has not carefully screened prospective treaty traders. Statistics provided in the *amicus curiae* brief of

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[33] State Dept. telegram No. 089024 to Japanese Posts, ¶ 4, *reprinted in* 58 Interpreter Rel. 478, 479 (Sept. 17, 1981).

the Ministry of International Trade & Industry show that the ratio of Americans to Japanese employed directly by Japanese owned trading companies in the U.S. is 1.4 to 1 (5, n. 5). Thus, over 40% of the entire work force of these companies is Japanese. With respect to Sumitomo, its 1977 EEO-1 reveals that 28 of its 31 officials and managers are "Oriental." Twenty-five of its 35 professionals, and 37 of its 43 sales workers are also "Oriental" (App. 67a). Presumably, many, if not all, of the persons who are classified as "Oriental", entered the United States as treaty traders. These employees apparently received E-1 visa approval despite the fact that many work in job categories which are not provided for in Article VIII of the Treaty (e.g. sales workers). Furthermore, Sumitomo itself classifies many of these treaty trader employees as "managerial and supervisory," while Article VIII provides only for the admission of executives, technical experts and specialists (App. 38a-40a).

Finally, this Court and the lower federal courts have consistently held that Title VII jurisdiction is not foreclosed because another agency or forum may review the same factual situation within a different statutory or adjudicative framework. *Alexander v. Gardner Denver Co.*, 415 U.S. 36 (1974) (arbitration pursuant to collective bargaining agreement); *County of Washington v. Gunther*, ___ U.S. ___, 68 L.Ed.2d 751 (1981) (Equal Pay Act); *Tipler v. E. I. duPont deNemours & Co.*, 443 F.2d 125 (6th Cir. 1971) (National Labor Relations Board); *Norman v. Missouri Pacific Railroad*, 414 F.2d 73 (8th Cir. 1969) (National Mediation Board); *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979) (intra-corporate remedies); *Smallwood v. National Can Co.*, 583 F.2d 419 (9th Cir. 1978) (intra-union remedies); *Smouse v. General Electric Co.*, 626 F.2d 333 (3d Cir. 1980) (State's highest court interpreting state human rights law not given *res judicata* effect); *Page v. Curtiss-Wright Corp.*, 332 F.Supp. 1060 (D.N.J. 1971) (Office of Federal Contract Compliance). Thus, even if the State Department were to consider Title VII implications as part of its visa screening procedure, this would not operate as a bar to Title VII review by the EEOC and the federal courts.

IV.

THE EXPANDED BFOQ EXCEPTION PROPOSED BY THE SECOND CIRCUIT IS TOTALLY INCONSISTENT WITH TITLE VII GOALS AND ENFORCEMENT STANDARDS.

The court below, having correctly determined that Title VII applies to Japanese companies doing business in the United States, undermined the enforcement of this decision by instructing the district court that Sumitomo was entitled to assert a broadened bfoq exception. According to the Second Circuit, this broadened exception would give "due weight to [Sumitomo's] Treaty rights and unique requirements. . . .", 638 F.2d at 559 (Pet. App. 15a). Under the Second Circuit's interpretation, the trial court must consider such factors as Japanese "cultural skills, . . . customs, and business practices, . . . familiarity with the personnel and workings of the principal or parent enterprise in Japan, and . . . acceptability to those persons with whom the company or branch does business."

According to the Second Circuit, Sumitomo need only show at trial "some evidence" of these factors to be relieved of a Title VII obligation. *Ibid.* Clearly, an exception of this breadth would reduce Title VII to a hollow shell. The petitioner itself concedes that the exception carved out by the Second Circuit is so radical that it might well lead one to "conclude that the effect on the BFOQ exception is a further argument against holding that Title VII is applicable" (Pet. Br. 41). Thus, even petitioner recognizes that the lower court's liberalized exception could have a severely negative impact on Title VII enforcement.

The Second Circuit's proposed standard simply cannot be reconciled with this Court's teaching "that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination based on sex." *Dothard v. Rawlinson, supra,* 433 U.S. at 334. The Second Circuit's ruling is also inconsistent with EEOC guidelines for use of a national origin bfoq. The guidelines state:

> The exception stated in Section 703(e) of Title VII that national origin may be a bona fide occupational

qualification shall be strictly construed. 29 C.F.R. § 1606.4.

The bfoq exception is to be narrowly construed because it constitutes a license to discriminate. An employer invoking this exception has made a determination that employment discrimination is essential for business reasons. If the federal courts were to liberally grant such license, widespread employment discrimination would never be eradicated.

When the Senate debated the bfoq provision, Senator McClellan sought a broad provision which would have given an employer the right to hire an individual "of a particular race, color, religion, sex, or national origin" if the hiring of that individual would be "more beneficial to the normal operation of the particular business or enterprise involved or to the good will thereof than the hiring of an individual without consideration of his race, color, religion, sex, or national origin. . ." Senator McClellan also proposed that an employer could reject a person in a protected class if it would be in the best interest of his business to do so. 110 Cong. Rec. 13,825 (1964). In response, Senator Case, a sponsor and floor manager of Title VII, pointed out that such an amendment would destroy the effectiveness of the Act. *Ibid.* The Senate's ultimate rejection of the McClellan amendment supports the EEOC position that a bfoq exception should be granted only under extremely limited circumstances, and that customer attitudes and preferences do not constitute appropriate circumstances.[34]

Underlying the Second Circuit's expanded bfoq guidelines is the notion that recognition must be given to the prejudices of Japanese businessmen, both in the United States and Japan, against dealing with either non-Japanese or female personnel. In effect, the Second Circuit gives co-worker, customer or client prejudices legitimacy merely because such prejudices are as-

[34] Customer preference is not even mentioned as a possible bfoq exception in the EEOC national origin guidelines. In the sex discrimination guidelines, EEOC indicates that customer preference can come into play only where necessary for the purpose of "authenticity or genuineness," as where an employer needs to employ an actor or actress. 29 C.F.R. § 1604.2(a)(iii) and (a)(2).

serted by foreign nationals—the precise approach espoused by Senator McClellan and rejected by the Senate. Moreover, the Second Circuit entirely overlooked the sex discrimination aspect of this case when it articulated what it determined to be appropriate bfoq factors. If, for example, a court were to accept Japanese customs with regard to the employment of women in executive capacities, females would be effectively barred from holding such positions. See *The Role and Status of Women Workers in the United States and Japan, supra,* at 41.

Respondents suggest that the reasoning employed by the Ninth Circuit in *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981) should be adopted. In that case, the employer claimed that the aggrieved female plaintiff would be unacceptable to the company's Latin American customers if she were promoted to a particular executive position, as she would be functioning in a manner inconsistent with the "proper" sex roles expected by male Latin American customers. The Ninth Circuit rejected this contention, ruling:

> [S]tereotypic impressions of male and female roles do not qualify gender as a bfoq . . . Nor does stereotyped customer preference justify a sexually discriminatory practice. *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir.), *cert. den.*, 404 U.S. 950 (1971). Furthermore, the Equal Employment Opportunity Commission has held that the need to accommodate racially discriminatory policies of other nations cannot be the basis of a valid bfoq exception. EEOC Decision No. 72-0697, CCH EEOC Decision 1971, ¶ 6317 at 4569.
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> Wynn attempts to distinguish *Diaz* by asserting that a separate rule applies in international contexts. Such a distinction is unfounded. Though the United States cannot impose standards of non-discriminatory conduct on other nations through its legal system, the district court's rule would allow other nations to dictate discrimination in this country. No foreign

> nation can compel the nonenforcement of Title VII here. 653 F.2d at 1276-1277.[35]

The rationale of *Wynn* is sound. The biases of foreigners, whether from South Africa, the Middle East, Latin America or Japan simply cannot be used to block elimination of employment discrimination in the United States, a goal which was given the highest priority by Congress when it enacted Title VII. *Christiansberg Garment Co. v. EEOC*, 434 U.S. 412 (1978). Acceptance of a relaxed bfoq exception for foreign corporations and their domestic subsidiaries would create a totally inappropriate double standard. Adherence to the appropriate narrow bfoq exception does not mean that a company such as Sumitomo, doing business with a parent corporation abroad, is foreclosed from using objective job specifications and requirements for particular positions. Some of these positions may well require knowledge of the Japanese language, products, markets or business practices.[36] Of course, women as well as persons not of Japanese origin, may meet these requirements. Customer preferences, customs and other subjective criteria reflecting prohibited biases, however, simply cannot be tolerated.

This Court has held that Title VII's "focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual or national class." *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978). The attempt of the court below to accommodate Sumitomo's "class" prejudices is antithetical to the goal of protecting individual rights and must be rejected.

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[35] See also *In Re American Jewish Congress v. Carter*, 19 Misc.2d 205, 190 N.Y.S.2d 218 (Sup. Ct. N.Y. Cty. 1959), *modified* 10 A.D.2d 833, 199 N.Y.S.2d 157 (1st Dept. 1960), *aff'd* 9 N.Y.2d 223, 173 N.E.2d 778 (1961).

[36] *Amicus curiae* Japan External Trade Organization ("JETRO") argues that U.S. based firms which hire more than a small percentage (2.5%) of Japanese do so "only during the initial phase of their American existence. . . ." According to JETRO, "Japanese personnel are concentrated in second-level managerial positions, where they provide assistance to top management on matters of finance, production and technology; other such personnel are sent from the parent company on a temporary basis, for example, to give technical advice during busy seasons or under other special circumstances" (Br. 11). Obviously, this description is inapplicable to Sumitomo.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Second Circuit denying the motion to dismiss should be affirmed. The rulings of the court below that petitioner is entitled to rights under Article VIII(1) of the Treaty and to an expanded bfoq should be reversed. This case should be remanded for further proceedings.

Respectfully submitted,

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